

**STATE OF MICHIGAN
SUPREME COURT**

RICHARD WILLIAM DORKO,
Plaintiff-Appellant,

v

SHERRY SUE DORKO,
Defendant-Appellee.

**Supreme Court
Case No.**

**Court of Appeals
Case No. 333880**

**Circuit Court
Case No. 2004-5765-DM**

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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**STATEMENT OF JURISDICTION AND IDENTIFICATION OF ORDER AND
OPINION APPEALED FROM**

This is an appeal from the Michigan Court of Appeals' Opinion affirming the circuit court's decision to deny Plaintiff-Appellant's effort to set aside Qualified Domestic Relations Orders that were entered more than 10 years after the Judgment of Divorce was entered.

The Michigan Court of Appeals Opinion, an unpublished Opinion, was released on August 17, 2017, and is founded on the published Opinion of a different panel of the Michigan Court of Appeals in *Joughin v Joughin*, ____ Mich App ____; ____ NW2d ____ (2017) (Docket No. 329993); which was released for publication on July 11, 2017.

The trial court's Order Denying Plaintiff's Motion to Set Aside First Qualified Domestic Relations Order and to Deny Second Qualified Domestic Relations Order was entered in the circuit court on June 27, 2016.

This is an Application for Leave to Appeal following decision in the Michigan Court of Appeals in accordance with MCR 7.303(B)(1) and MCR 7.305. Thus, this Honorable Court's review is discretionary. MCR 7.303(B)(1).

GROUND FOR APPEAL

The Michigan Court of Appeals in *Joughin v Joughin*, ____ Mich App ____; ____ NW2d ____ (2017) (Docket No. 329993), held that Michigan has no statute-of-limitations period for the entry of a qualified domestic relations order concerning the division of retirement benefits in a divorce case. The Opinion is not unanimous, and the Honorable Kathleen Jansen authored a Dissenting Opinion.

While the Opinion in *Joughin* directly relates to the issues in this case, the *Joughin* case and this case were not consolidated for appeal, and Plaintiff-Appellant did not know that the *Joughin* matter was pending at the same time that his appeal was pending in the Court of Appeals.

The *Joughin* Opinion was released for publication just four weeks before Plaintiff-Appellant's oral argument in the Court of Appeals in this case. Thus, the Michigan Court of Appeals panel in this case was bound by the holding in the prior Opinion in the *Joughin* case.

This Application for Leave to Appeal is supported by grounds for appeal in accordance with MCR 7.305(B). Whether there is a statute-of-limitations period for the entry of a qualified domestic relations order concerning the division of retirement benefits in a divorce case, especially where there is a 10-year statute-of-limitations period for the enforcement of the underlying judgment of divorce, is an issue that involves a legal principle of major significance to the state's jurisprudence. MCR 7.305(B)(3). Where the Michigan Court of Appeals held that the 10-year statute-of-limitations period stated in MCL 600.5809(3) does not apply to the entry of a qualified domestic relations order in a divorce case, the Michigan Court of Appeals has held the statute invalid. MCR 7.305(B)(4)(b). Where the Michigan Court of Appeals held that the 10-year statute of limitations period does

not apply to the entry of a qualified domestic relations order in a divorce case, the Michigan Court of Appeals' decision is clearly erroneous and will cause material injustice to Plaintiff-Appellant.

QUESTION PRESENTED

- I. Did The Michigan Court Of Appeals Err When It Held That The Entry Of A Qualified Domestic Relations Order Is Not Subject To A Statute-Of-Limitations Period?

Plaintiff-Appellant answers “Yes.”

Defendant-Appellee answers “No.”

Michigan Court of Appeals answers “No.”

Trial Court answers “No.”

STANDARD OF REVIEW

This appeal involves application and interpretation of case law, statutes, and court rules; therefore, the standard of review is *de novo*. *Neville v Neville*, 295 Mich App 460; 812 NW2d 816 (2012); *Henry v Dow Chem Co*, 484 Mich 483; 772 NW2d 301 (2009); *Estes v Titus*, 481 Mich 573; 751 NW2d 493 (2008).

“A trial court’s decision interpreting a divorce judgment and a qualifying domestic relations order is reviewed *de novo* . . . as are questions of statutory interpretation.” *Hudson v Hudson*, 314 Mich App 28; 885 NW2d 652 (2016); citing *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012) and *AFSCME v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003).

STATEMENT OF THE FACTS

On August 3, 2005, the trial court entered a Judgment of Divorce concerning these parties. [Judgment of Divorce; Register of Actions.] The Judgment of Divorce awards Defendant-Appellee one-half of the marital portion of Plaintiff-Appellant's pension and retirement benefits via directive to prepare a Qualified Domestic Relations Order (QDRO). Specifically, the Judgment of Divorce states:

Qualified Domestic Relations Order: Defendant is awarded $\frac{1}{2}$ of the marital interest of Plaintiff's retirement plan via QDRO through employment with General Motors. She shall share in any early retirement subsidy under the Plan in proportion to her award. She shall be entitled to cost-of-living and other post-retirement increases in proportion to her award. She shall be allowed to elect to receive benefits under the Plan as soon as the Plan permits. To the extent necessary to protect her interest in the event of Plaintiff's death, she shall be designated surviving spouse.

[Judgment of Divorce, 6-7.]

On August 3, 2015, a 10-year period from the entry of the Judgment of Divorce expired without any effort to renew the Judgment. [Register of Actions.]

On August 11, 2015, 8 days after the 10-year period from the entry of the Judgment of Divorce expired; Defendant-Appellee filed her first proposed QDRO under the seven-day rule. [Register of Actions.] The first QDRO was entered, however; the plan administrator rejected the first QDRO as unqualified, and Defendant-Appellee sought to enter a second, amended QDRO.

Plaintiff-Appellant challenged the entry of the QDROs in the trial court asserting the 10-year statute of limitations for the enforcement of a judgment of divorce.

On May 16, 2016, the trial court stated on the record its decision to deny Plaintiff-Appellant's Motion concerning the time-bar and directed Defendant-Appellee to submit an

Amended QDRO, which was entered on June 24, 2016. [Transcript of Opinion; Register of Actions.]

On June 27, 2016, the trial court entered the Order Denying Plaintiff-Appellant's Motion to Set Aside First Qualified Domestic Relations Order and to Deny Second Qualified Domestic Relations Order. [Register of Actions.]

The Michigan Court of Appeals granted Plaintiff-Appellant's Application for Leave to Appeal, and Plaintiff-Appellant's appeal commenced in the Michigan Court of Appeals. However, the Michigan Court of Appeals in *Joughin v Joughin*, ____ Mich App ____; ____ NW2d ____ (2017) (Docket No. 329993), held that Michigan has no statute-of-limitations period for the entry of a qualified domestic relations order concerning the division of retirement benefits in a divorce case. The Opinion is not unanimous, and the Honorable Kathleen Jansen authored a Dissenting Opinion.

While the Opinion in *Joughin* directly relates to the issues in this case, the *Joughin* case and this case were not consolidated for appeal, and Plaintiff-Appellant did not know that the *Joughin* matter was pending at the same time that his appeal was pending in the Court of Appeals.

The *Joughin* Opinion was released for publication just four weeks before Plaintiff-Appellant's oral argument in the Court of Appeals in this case. Thus, the Michigan Court of Appeals panel in this case was bound by the holding in the prior Opinion in the *Joughin* case.

Plaintiff-Appellant now files his Application for Leave to Appeal and requests that this Honorable Court review the Michigan Court of Appeals' holding in *Joughin* that Michigan has no statute-of-limitations period for the entry of a QDRO concerning the

division of retirement benefits in a divorce case, which binds the Michigan Court of Appeals panel in this case.

ARGUMENT

- I. The Michigan Court Of Appeals Erred When It Held That The Entry Of A Qualified Domestic Relations Order Is Not Subject To A Statute-Of-Limitations Period.

Law and Precedent

Michigan's 10-year statute of limitations concerning enforcement of judgments provides as follows:

(1) A person shall not bring or maintain an action to enforce a noncontractual money obligation unless, after the claim first accrued to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by this section.

...

(3) Except as provided in subsection (4), the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record of this state ... from the time of the rendition of the judgment or decree. ... Within the applicable period of limitations prescribed by this subsection, an action may be brought upon the judgment or decree for a new judgment or decree. The new judgment or decree is subject to this subsection.

(4) For an action to enforce a support order that is enforceable under the support and parenting time enforcement act, Act No. 295 of the Public Acts of 1982, being sections 552.601 to 552.650 of the Michigan Compiled Laws, the period of limitations is 10 years from the date that the last support payment is due under the support order regardless of whether or not the last payment is made.

MCL 600.5809.

Actions to enforce property division under the provisions of divorce judgments are subject to the 10-year statute-of-limitations period that runs from entry of the judgment.

MCL 600.5809(3); *Peabody v DiMeglio*, 306 Mich App 397; 856 NW2d 245 (2014).

However, actions to enforce support payments under the provisions of divorce judgments are subject to the 10-year statute-of-limitations period that runs from the last

support-payment due date. MCL 600.5809(4); *Rybinski v Rybinski*, 333 Mich 592; 53 NW2d 386 (1952); *Torakis v Torakis*, 194 Mich App 201; 486 NW2d 107 (1992).

A judgment may be renewed for another 10 years if that renewal occurs within the first 10-year limitations period. MCL 600.5809(3).

In 2012, the Michigan Court of Appeals held that a QDRO is part of the judgment of divorce and subject to time limitations. *Neville v Neville*, 295 Mich App 460; 812 NW2d 816 (2012). In *Neville*, the parties were divorced in 1995, and the divorce judgment awarded one party a portion of the other party's retirement benefits. An action was brought 14 years later to amend the QDRO that was entered in 1995. The Court of Appeals held that the motion to amend the QDRO was time-barred because the QDRO is considered part of the judgment and is subject to the time limitation applicable to amendment of orders contained in MCR 2.612. Part of the court's reasoning included the statutory directive in MCL 552.101(4) that a divorce judgment determine all vested and unvested rights of the parties to any pension, annuity, or retirement benefit. Specifically, the statute provides:

- (4) Each judgment of divorce or judgment of separate maintenance shall determine all rights, including any contingent rights, of the husband and wife in and to all of the following:
 - (a) Any vested pension, annuity, or retirement benefits.
 - (b) Any accumulated contributions in any pension, annuity, or retirement system.
 - (c) In accordance with section 18 of 1846 RS 84, MCL 552.18, any unvested pension, annuity, or retirement benefits.

MCL 552.101(4). Further, the *Neville* court reasoned that the Michigan Court of Appeals in *Mixon v Mixon*, 237 Mich App 159; 602 NW2d 406 (1999), construed the statute as requiring that pension rights be decided conclusively. *Neville*, 467. Thus, where the judgment of divorce directs entry of a QDRO consistent with the obligation to conclusively decide the parties' rights in a pension, the QDRO is considered part of the judgment of divorce and is not a completely separate order. *Neville*, 467.

Retirement benefits accrue at the time that rights to the benefits are earned by the party, and Michigan statute directs that retirement benefits accrued during the marriage are divisible in a divorce. MCL 552.18. Specifically, the statute states that the following retirement benefits are includable in the marital estate:

- (1) Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit **accrued** by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.
- (2) Any rights or contingent rights in and to unvested pension, annuity, or retirement benefits payable to or on behalf of a party on account of service credit **accrued** by the party during marriage may be considered part of the marital estate subject to award by the court under this chapter where just and equitable.

...

MCL 552.18 (emphasis added).

However, the Michigan Court of Appeals very recently held that Michigan's statute of limitations does not time-bar the entry of a QDRO. *Joughin v Joughin*, ____ Mich App ____; ____ NW2d ____ (2017) (Docket No. 329993). The Michigan Court of Appeals reasoned that entry of the QDRO is merely a ministerial task undertaken in conjunction with the judgment of divorce; thus, when a party complies with the directive in the judgment of divorce to enter a QDRO, the party is only supplying information and is not endeavoring to enforce the terms of the judgment of divorce. *Joughin*.

The appellate court's Opinion in *Joughin* is not unanimous, and Judge Kathleen Jansen authored a Dissenting Opinion. The Dissenting Opinion reasons that the majority has circumvented the statute of limitations by proclaiming the entry of a QDRO a mere ministerial task and that, by extension, other ministerial tasks done in conjunction with a divorce judgment are no longer time-barred. *Joughin*, Dissenting Opinion. The Dissenting

Opinion also argues that the majority disregards the purpose of a statute of limitations: to encourage prompt recovery, provide security against stale demands, and remedy the problems associated with delay. *Joughin*, Dissenting Opinion; citing *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982).

The primary goal of judicial interpretation of statutes is to discern the intent of the Legislature, and the Legislature's intent is revealed by examining the specific language of the statute. *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002). If the statutory language is clear, the court presumes that the Legislature intended the meaning it has plainly expressed, and the statute will be enforced as written. *Federated Publications, Inc*. Every word or phrase of a statute will be given its plain and ordinary meaning. *Federated Publications, Inc*. When interpreting a statute and determining the Legislature's intent in drafting a statute, we must first look to the actual language of the statute and as far as possible give effect to the plain meaning of every phrase, clause, and word in the statute. *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010).

Application of Law and Precedent

Applying the law and precedent to this case, the Michigan Court of Appeals committed error when it held that Michigan has no statute of limitations for the entry of a QDRO concerning the division of retirement benefits in a divorce case.

Michigan's Legislature has clearly stated the 10-year statute of limitations period for enforcement of divorce judgments. MCL 600.5809(3). The Legislature also stated a different, separate, and distinct limitations period for support payments in the very next section. MCL 600.5809(4). If the Legislature had intended a different, separate, and distinct

limitations period for division of pension and retirement benefits, or ministerial tasks, the Legislature could have stated so. Because the Legislature sets forth a different, separate, and distinct limitations period for support payments, and chose not to set forth a different, separate, and distinct limitations period for pension or retirement benefits, the Legislature has clearly intended that division of pension and retirement benefits fall within the general 10-year statute of limitations.

Where, in accordance with *Neville*, a QDRO is a part of the judgment of divorce, and, in accordance with *Peabody v DiMeglio*, enforcement of a judgment of divorce is limited by the 10-year statute-of-limitations period, it is clear that entry of the QDRO is limited by the statute-of-limitations period. Importantly, the power to enter a QDRO at all is derived from the terms of the judgment of divorce and nowhere else. Thus, entry of the QDRO is an effort to enforce the terms of the judgment of divorce, and the majority's reasoning in *Joughin* circumvents the statute of limitations.

Also, in accordance with the majority's reasoning in *Joughin*, that the entry of the QDRO is merely a ministerial task that isn't time-barred, other ministerial tasks wouldn't be time-barred either. These might include the entry of a deed, the transfer of title in a vehicle, the closing of banking and credit-card accounts, and the physical transfer of personal property. All of these ministerial tasks are attendant with the terms of a judgment of divorce, all are efforts to enforce the terms of a judgment of divorce, and all would be time-barred by the statute of limitations. So, how should family-law practitioners, courts, and litigants in Michigan decide which ministerial tasks are time-barred and which are not?

Further, in accordance with the precedents set in *Neville* and *Joughin*, a family-law practitioner is encouraged to delay entry of a QDRO for division of retirement benefits

because there is no limitations period for entry of the QDRO, but once entered, the QDRO can only be amended for up to one year. So, it would benefit a party to wait until just before the other party retires to attempt entry of a QDRO, which is a result that clearly is not realized or intended by the *Joughin* majority.

Conclusion

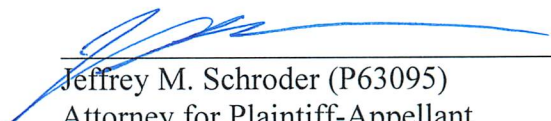
Michigan family-law practitioners, courts, and litigants deserve a clear and concise statute-of-limitations period for the entry of QDROs, and the applicable statutes and case law prior to the Michigan Court of Appeals' holding in *Joughin* provide that clarity.

The result of the holding and the reasoning in *Joughin* will be convoluted, delayed litigation involving retirement benefits years or decades after the judgment of divorce is entered, and, as in this case, years after a litigant has already retired. The litigation necessary to unravel the parties' property-rights and interests in retirement benefits years or decades after the entry of the judgment of divorce greatly impacts the parties who are required to pay attorney fees that are much higher because a party has delayed. Indeed, Defendant-Appellee has already commenced an action to recover retirement benefits from Plaintiff-Appellant that Plaintiff-Appellant received before Defendant-Appellee even sought entry of her QDRO.

RELIEF REQUESTED

Plaintiff-Appellant requests that this Honorable Court (1) overturn the holding in *Joughin v Joughin*, ____ Mich App ____; ____ NW2d ____ (2017) (Docket No. 329993); reverse the Opinion of the Michigan Court of Appeals that was stated in reliance on the holding in the *Joughin* case; and remand this case to the circuit court with specific direction to set aside the QDROs entered after the statute-of-limitations period expired; or (2) grant Plaintiff-Appellant's Application for Leave to Appeal.

Respectfully submitted:



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Dated: September 28, 2017